SEP 2 2 2003

No. 03-83

IN THE
Supreme Court of the United States

CIGNA HEALTHCARE OF TEXAS, INC.,
Petitioner,

v.

RUBY R. CALAD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

ROBERT N. ECCLES
(*Counsel of Record*)
JONATHAN D. HACKER
ALISSA M. STARZAK
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONERS

The small mountain of briefs filed in this case and related cases together make one point abundantly clear: every plaintiff, defendant, professional organization, and State with an interest in the issue presented here believes that now is the time for this Court to resolve the question whether the Employee Retirement Income Security Act ("ERISA") preempts state statutes, such as the Texas Health Care Liability Act ("THCLA"), that purport to impose liability for benefit determinations under ERISA-governed employee benefit plans whenever such determinations include a medical component. Other than the merits, the only issues disputed in the briefs are whether the Court should decide the question in terms of "relates to" preemption under ERISA § 514 or "complete preemption" under § 502(a)(1)(B), and, relatedly, which case the Court should use as a vehicle for deciding the question.

Since the principal certiorari papers were filed in the various cases, however, one of the cases has dropped out: *Roark v. Humana Health, Inc.*, No. 02-1826, the only case to present the issue solely as one of "relates to" preemption under § 514. The withdrawal of the *Roark* petition eliminates any basis for limiting review of this question to § 514, leaving this case and its companion, *Aetna Health Inc. v. Davila*, No. 02-1845, as well as *Vytra Healthcare v. Cicio*, No. 03-69, which present the issue in the more logical form of "complete preemption" under § 502(a)(1)(B), as interpreted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987).

All affected parties agree that the basic question presented here – whether ERISA preempts claims such as Calad's – is one the Court should address. As the American Medical Association and Texas Medical Association (amici supporting the plaintiff in No. 02-1826) aptly put it:

However the issue is defined, the interrelationship be-

> tween ERISA preemption and the application of state-law medical malpractice standards to an HMO's medical necessity decisions continues to confound litigants and produce contradictory decisions from both state and federal courts. This Court's guidance is sorely needed to provide direction in this increasingly muddled corner of ERISA jurisprudence.

AMA Br., No. 02-1826, at 14. AARP adds:

> The Court has the opportunity to bring certainty to this issue that plagues so many lower courts. . . . AARP believes it is incumbent upon the Court to sort out federal jurisprudence in such a way to bring consistency to the interpretation of federal law. The development of the law has reached the point that a definitive answer is needed.

AARP Br., No. 02-1826, at 6-7. In addition, fourteen States, joined by the District of Columbia and the Commonwealth of Puerto Rico, also urge review of this issue so the Court can resolve a "split among the courts of appeals on the issue whether ERISA preempts state laws that regulate mixed eligibility and treatment decisions." States Br., No. 02-1826, at 4. And the American Association of Health Plans, joined by the nation's leading business and employee benefits organizations, has also urged review – twice, in fact. AAHP Br., No. 02-1845; AAHP Br., No. 03-69.

Despite all of the forces supporting review of the question presented here, respondent gamely insists that certiorari in this case is unwarranted. Her arguments are without merit.

1. Respondent suggests that the Court should address the issue only in terms of § 514 preemption. Opp. 1 n.1, 25. But the withdrawal of the *Roark* petition deprives the Court of that option. If the Court is now going to resolve the controversy over whether state-law claims such as respondent's may proceed, it will have to do so in the complete preemption terms

presented here. Avoiding the complete preemption analysis would have been an unsound course in any event – and this Court thus should not await a case that, like *Roark*, addresses the issue only under § 514.

When this Court first answered the question presented here in *Pilot Life* and *Metropolitan Life*, the Court did not limit its answer to § 514. The Court's unanimous holding in *Pilot Life* was that § 502(a)(1)(B), which establishes a private cause of action for challenging the denial of benefits by an ERISA-governed benefit plan, establishes the "exclusive" vehicle for challenging benefit denials, and thus preempts any state-law claim that purports to supplement or alter the remedies available (or not available) under ERISA. *See* 481 U.S. at 56. Because federal preemption normally provides only a federal-law defense to a state-law claim, however, a complaint pleading such a preempted state-law claim does not itself arise under federal law, and thus does not itself raise a federal question jurisdiction authorizing removal of the action. *See Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). But in *Metropolitan Life*, decided the same day as *Pilot Life*, the Court noted a corollary to this "well-pleaded complaint rule": "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." 481 U.S. at 63-64. When a federal law "completely preempts" state law in this manner, the federal law automatically "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 65. The *Metropolitan Life* Court then held, again unanimously, that the § 502(a)(1)(B) preemption rule announced in *Pilot Life* was within this category of "complete preemption," so that any kind of "suit by a beneficiary to recover benefits from a covered plan" (*id.* at 62-63) automatically becomes an action arising under § 502(a)(1)(B) and thus removable to federal court. *Id.* at 66-67.

In view of the structure of the analysis and the conclusions in *Pilot Life* and *Metropolitan Life*, it would make little sense to decide whether state-law claims such as respondent's are preempted by ERISA, as interpreted by *Pilot Life* and *Metropolitan Life*, *without* deciding whether such claims are "completely preempted" under those decisions. Indeed, the one conclusion effectively follows from the other: if a state-law claim supplements or alters the civil enforcement scheme detailed in ERISA § 502(a), then it is both preempted under *Pilot Life* and, necessarily, completely preempted under *Metropolitan Life*. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) ("the civil enforcement provisions are of such extraordinarily preemptive power that they override even the 'well-pleaded complaint' rule for establishing the conditions under which a cause of action may be removed to a federal forum").[1]

2. Given the withdrawal of the *Roark* petition, respondent's only real argument for denying review in this case is that the decision below was correct on its merits. It is only on the basis of her view of the merits, in other words, that she rests her attempt to dispute the existence of a cert-worthy conflict between the decision below and decisions both of this Court and of other circuits. This attempt fails.

Respondent contends that the decision below does not conflict with *Pilot Life*'s categorical preemption rule because *Pilot Life* involved only "contract-based" causes of action related to ministerial claims processing, and thus does not speak to the preemption of tort claims asserting medical malpractice. Opp. 7. But respondent herself tacitly concedes that the decision below cannot be reconciled with *Pilot Life* on that basis – like the Fifth Circuit, respondent is forced to *reject* the actual *Pilot Life*

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[1] Further, as Aetna explains, because complete preemption establishes the basis for federal jurisdiction, the Court's Article III obligation to address jurisdiction first effectively requires the Court to address the complete preemption issue before considering defensive preemption under § 514. Aetna Reply Br., No. 02-1845, at 9-10.

rule in order to defend her position. She thus derides the unanimous *Pilot Life* opinion as lost in a "Pleistocene era of ERISA-preemption law," Opp. 24, during which this Court adhered to a "virtually limitless view of ERISA preemption," a view from which the Court has subsequently "retrench[ed]," *id.* at 11. The Fifth Circuit in this case adopted much the same view: respondent's claims might be completely preempted if the court actually followed *Pilot Life* itself, but, the court decided, subsequent opinions had suggested a different, more "narrow" rule, Pet. App. 19a – one that is in fact the direct opposite of the rule actually enunciated in *Pilot Life*, Pet. 10. Respondent's brief in opposition thus merely confirms that this is a prototypical case for certiorari: if *Pilot Life*'s categorical, complete preemption rule itself is nothing but a Pleistocene-era fossil, as respondent and the Fifth Circuit evidently believe, only this Court can say so, *see* Pet. 13; until then the *Pilot Life* rule cannot be ignored in favor of a new, contradictory preemption rule "glean[ed]" from dicta in subsequent opinions, Pet. App. 19a.

Respondent relies on the same flawed distinction with *Pilot Life* in her effort to deny the existence of a cert-worthy circuit conflict (respondent agrees the circuits are split over whether claims such as hers are preempted under § 514). Opp. 14. Respondent contends that the Second, Fifth and Eleventh Circuits have held (correctly under *Pilot Life*, she says) that state-law *medical malpractice* claims may be directed at benefit denial decisions without running afoul of ERISA, whereas other circuits have found (also correctly under *Pilot Life*, she says) only state-law claims such as *bad faith* preempted by ERISA. In respondent's view, *Pilot Life*'s "categorical preemption rule," *Rush Prudential*, 536 U.S. at 379, is not categorical at all, but instead allows states to create independent state-law claims for ERISA plan benefit decisions so long as the claim is simply labeled "medical malpractice" rather than "bad faith." But nothing in *Pilot Life* – or any subsequent decision of this Court

– supports such an empty, formalistic approach to the protection of ERISA plans from varying and inconsistent state regulation.[2]

More to the point, no circuit court on either side of the preemption controversy, including the court below, has adopted respondent's view that ERISA preemption turns simply on what the state-law claim is labeled. All courts have understood that the question is what kind of plan decision the state-law

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[2] Respondent's effort to distinguish medical-malpractice claims from other claims is based on her contention that medical care is a subject that "states may properly regulate wholly independently of ERISA." Opp. 10; *see Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (health care is "subject of traditional state regulation"). But this Court made perfectly clear in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), that even in areas of traditional state regulation – such as divorce, as in *Egelhoff*, 532 U.S. at 151 – ERISA will preempt any state law that purports to "govern the payment of benefits," *id.* at 147. Thus the question is not what the state-law claim is called, or what motive the state has for regulating – the issue is simply whether the state-law claim regulates the payment of ERISA plan benefits. Respondent's state-law claim in this case directly challenges CIGNA's decision to deny her benefit coverage. The fact that the decision was based in part on medical judgment is irrelevant to whether or not her state-law claim is preempted – assuming *Pilot Life*'s categorical preemption rule is in fact categorical.

Respondent's contention that *Pegram* has "significantly circumscribed" the *Pilot Life* rule, Opp. 11-14, is both incorrect and irrelevant. As respondent herself admits, "*Pegram* was not a preemption case," Opp. 11, and thus its reference to preemption of claims based on "mixed" eligibility and treatment decisions is dictum at best. Such dictum, even if it were applicable here, would not allow a lower court to ignore the square holding of this Court's prior precedent. *See supra* at 5. Even more important, *Pegram*'s dictum does *not*, in any event, apply to the kind of decision involved here. *Pegram* discussed only the preemption of claims involving benefit determinations that include an actual *treatment* decision by a physician *responsible for the beneficiary's medical care*. Pet. 12. It may well make sense for state medical malpractice law to apply in that circumstance. But it makes no sense, and conflicts directly with ERISA's remedial scheme and with *Pilot Life*, for medical malpractice law to govern a benefit eligibility determination made by an HMO employee who is *not* the beneficiary's treating physician, as both the Solicitor General and Judge Calabresi have recognized. *Id.*

claim purports to regulate. Courts that have found claims *not* preempted focus on the medical component of the decision as a permissible basis of state regulation; courts that have found claims preempted hold that the presence of a medical component is immaterial, because whatever the basis for the state-law regulation of benefit decisions, the fact is that any such regulation disrupts the "core ERISA concern" of assuring "nationally uniform plan administration." *Egelhoff*, 532 U.S. at 148; *see Cicio v. Does*, 321 F.3d 83, 109 (2d Cir. 2003) (Calabresi, J., dissenting) ("there is no apparent reason, in state or federal law, for treating the unlawful coverage decision [based on medical error] any differently from any other unlawful coverage decision that is *not* based on medical error").

We submit that the latter view is correct. *See supra* note 2. But what matters most for present purposes is that the circuit-court precedents involving benefit denials with a component of medical judgment are in clear and irreconcilable conflict over whether such benefit denials may be regulated by States, or whether the exclusive remedial scheme set forth in § 502(a) completely preempts such regulation. *See* Pet. 14-18.[3] The Court should grant certiorari to resolve that conflict.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

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[3] Circuit precedents involving purely administrative benefit denials also conflict directly with the decision below, contrary to respondent's protestations, Opp. 23. Those precedents hold state-law claims to be preempted even though such claims do not merely "duplicate" ERISA's remedies, Pet. 18, which is directly contrary to the preemption rule that now applies in the Fifth Circuit.

Respectfully submitted,

ROBERT N. ECCLES
(*Counsel of Record*)
JONATHAN D. HACKER
ALISSA M. STARZAK
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Petitioner

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